Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

FRED VARFES
Petitioner,

vs.

ANTHONY NEWLAND; WARDEN,
AND THE ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SHP

QUESTIONS PRESENTED

Whether the United States Court of Appeal for the Ninth Circuit erred in adopting the District Court's finding that petitioner's trial counsel was not ineffective in rendering petitioner's defense?

Whether the Ninth Circuit erred in finding that petitioner had not suffered a deprivation of due process from the trial court's denial of attempted juror dismissals for cause?

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VARFES V. NEWLAND, Order of the United States Court of Appeals for the Ninth Circuit, Case No. 99-15146 [Not Certified for Publication] (Issued October 20, 1999)

VARFES V. NEWLAND, Order Denying Petition for Habeas Corpus, No. C-97-3707 FMS, United States District Court for the Northern District of California (Filed June 29, 1998)

TABLE OF AUTHORITIES

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OPINIONS BELOW

The Order of the Court of Appeals for the Ninth Circuit, Filed October 20, 1999, affirming the district court's decision, was not certified for publication but appears in full as Appendix A to this petition. The Decision of the United States District Court, filed June 29, 1998, appears in full as Appendix B to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on October 20, 1999. (See Appendix A) Petition files the instant petition within the ninety (90) day limit from that date and this petition is therefore within the appellate jurisdiction of this court under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Title 28 U.S.C. § 2254 controlling the a writ of habeas corpus, specifically provision (d), to determine whether the decision [under question] unreasonably applied "clearly established Federal law, as determined by the Supreme Court" or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d) (West Supp. 1998).

This case also involves Title 28 U.S.C.A. § 2244(d), known as the Antiterrorism and Effective Death Penalty Act.

STATEMENT OF THE CASE

This is a petition from the Order of the United States Court of Appeals for the Ninth Circuit having jurisdiction pursuant to 28 U.S.C.A. § 2253 (West Supp. 1998). In the Order, dated October 20, 1999, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the United States District Court for the Northern District of California. The Northern District Court denied petitioner's federal petition for writ of habeas corpus challenging his conviction for one count of continuous sexual abuse of a minor with a special allegation and one count of misdemeanor child molestation.

Petitioner asserted before the Northern District Court that his conviction was in violation of due process as petitioner received ineffective assistance of counsel at trial. Furthermore, petitioner asserted that the trial court's denial of defense challenges for cause and failure to provide a jury instruction regarding unanimity as to the acts constituting ongoing sexual abuse were in violation of his right to due process.

The Order of the Ninth Circuit was not certified for Publication, and was entered and filed October 20, 1999.

STATEMENT OF THE FACTS

Petitioner was convicted of sexually abusing and molesting two children in his household in 1990 and 1991. One was Wendy Moran, the daughter of his common law wife; the other was Elizabeth Varfes, his daughter by Shirley Varfes, his estranged wife.

At trial, Wendy stated that Petitioner had been living with her and her mother, Roberta Moran, since 1986. She recounted sixteen times that Appellant had committed sexual acts with her between June 1990, when she was eleven, and July 1991, when she was twelve. The sexual acts included oral copulation and vaginal intercourse. Wendy testified that she had never had sex with or been sexually abused by anyone other than Appellant.

The government's witness, Dr. Mann, testified that Wendy had genital warts, a sexually transmitted disease, that her vaginal opening was large for her age, and that her hymen was notched and smaller than normal. These findings were consistent with a history of old vaginal penetration.

Testifying in his own defense, Petitioner denied Wendy's accusations. A doctor testified that he had examined Petitioner and found no present evidence of genital warts.

Petitioner's trial counsel also presented alibi

evidence, through the testimony of Robert Latner, intended to show that Petitioner was not alone with Wendy often enough to commit the acts she had described. Petitioner also said that he often went to Moose Lodge meetings in the evenings with Roberta, Wendy's mother. Roberta corroborated that testimony.

Another defense strategy suggested Wendy may have been molested by her biological father or have had sex with a boyfriend. Both Roberta and Wendy testified that Wendy had spent three or four days in July 1990 with her father at the motel. Wendy's father had admitted molesting another girl about Wendy's age, however Wendy's grandmother stayed with them the entire time. According to Wendy's friend Carol Janes, Wendy once said that her father had told her that anytime she wanted a baby, she only needed to come to him. Wendy and her father both denied that he had made such a statement.

The theory that Wendy had a boyfriend was based on the testimony of Dottie Cowles, a 75-year old friend of Petitioner's. She testified that several times in 1988 or 1989, Wendy had come home from school with "an odor to her from sexual contact." Cowles had assumed that Wendy had been having sex at school and never suspected that Wendy might be having sex with Petitioner.

Petitioner allegedly also molested Elizabeth, his daughter, three times in late June 1991. Elizabeth, who was twelve, was spending the summer with him and Roberta Moran. According to

Elizabeth's testimony, the first incident occurred when she was sitting on a couch in the living room with Appellant's feet in her lap. He put his heel on her crotch and moved it around it made her uncomfortable and upset, so she moved his foot. She called her mother, Shirley Varfes, soon afterwards and told her what had happened. A few days later, Petitioner asked Elizabeth to sit down next to him. He began to tickle her, and while doing so, he squeezed her left breast twice. Elizabeth became upset and told him not to do it. She again called her mother and told her about the incident. On a third occasion, Elizabeth was going out the door when Petitioner grabbed her behind. Elizabeth's testimony was corroborated by her mother, who said that she received three phone calls from Elizabeth, and by Wendy, who said that she twice heard Elizabeth tell Petitioner, "stop, or I'll break your finger."

In his defense, Petitioner testified that although Elizabeth sometimes massaged his legs and he sometimes tickled her and swatted her on the behind to make her hurry up, he never touched her inappropriately and never noticed her get upset. Roberta Moran also testified that she never saw any inappropriate contact.

After a jury trial, Petitioner was convicted by the Mendocino County Superior Court on June 24, 1992 of one count of continuous sexual abuse of a minor with a special allegation that he abused a position of special trust and one count of misdemeanor child molestation. He was sentenced

to seventeen years and $5,100 of restitution.

Petitioner filed an appeal and a consolidated writ of habeas corpus. The trial court held an evidentiary hearing in 1992, after Petitioner claimed that he had been convicted on the basis of false testimony. At the evidentiary hearing, Shirley Varfes testified that one morning during the trial, she and Elizabeth had been in the waiting area with a Victim/Witness officer. Elizabeth, who was throwing a temper tantrum about having to return to court and testify a second time, had said that if forced to testify again, she would say that "it was all a lie.' Maurice Roark, Sr., a friend of Shirley Varfes, corroborated Shirley Varfes ' testimony, and added that in the car on the way to court that morning, Elizabeth had said that she did not want to lie any more. Roark also testified that after the trial, when Elizabeth was staying at his house, Roark eavesdropped on a telephone conversation between Wendy and Elizabeth; he heard them talk about a secret boyfriend of Wendy's and heard Wendy say something like "we set [Petitioner] up real good." Shirley Varfes' cousin, Mary Ann Eckhardt, testified that several months before the trial, she heard Wendy brag about a boyfriend and twice heard her say that she had made the accusations because she was angry with Petitioner and wanted to get rid of him. Eckhardt testified that she did not tell anyone about these statements because she thought Wendy was just trying to get attention and because she thought that the trial had already happened.

Elizabeth and Wendy's testimony at the

hearing contradicted that of Shirley Varfes, Roark, and Eckhardt. Elizabeth admitted that she had threatened to say her testimony was a lie however, she maintained that her trial testimony had been true and that she had made her threat to avoid having to testify again. Elizabeth denied that she and Wendy had talked about a secret boyfriend or about setting up Petitioner. Wendy asserted that she had told the truth at trial, that she had no boyfriend, and that she had never told Eckhardt that she had fabricated her accusations. The trial court, finding that the testimony of Shirley Varfes, Roark, and Eckhardt was not believable, denied relief.

ARGUMENTS FOR REVERSING THE LOWER COURTS

I. PETITIONER RECEIVED THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The Ninth Circuit, through affirmation of the Order of the Northern District Court, found that petitioner had failed to establish that he received the ineffective assistance of trial counsel. Petitioner however asserts that his trial counsel's representation was deficient on several grounds and that such deficiencies resulted in prejudice to his defense.

Petitioner's trial counsel failed to offer potentially exculpatory evidence, failed to establish

that petitioner did not suffer from the sexually transmitted disease used to tie him to the victim and failed to ask for an instruction on his alibi defense. Through these failures, both individually and cumulatively, petitioner was prejudiced in his opportunities for both an effective defense and a fair trial.

Strickland v. Washington, 466 U.S. 668, 687 (1984), sets out a two-pronged test for evaluating an ineffective assistance of counsel claim. In order to demonstrate that his counsel was constitutionally ineffective, petitioner must show that his counsel's performance was so deficient that it fell below an "objective standard of reasonableness. " Strickland, 466 U.S. at 688. In addition, Petitioner must show that the deficient performance prejudiced the defense thus rendering the trial results unreliable. Id. at 687. In evaluating the second prong of the test, the Court must assess whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

In the order of the Northern District Court, the court determined that petitioner had failed to establish counsel's performance was deficient.

The Northern District Court reasoned that trial counsel was not deficient in failing to present testimony that corroborated his presented alibi evidence. At trial, counsel did in fact present the testimony of Roger Latner, who testified that petitioner met him for coffee three or four times a week in the morning. This evidence was produced

for the purpose of establishing that petitioner had an alibi for many of the alleged molestation incidents. The District court asserted that any potential persuasive effect from this testimony had been maximized at trial and therefore the petition offered no evidence that trial counsel could have done more for petitioner's defense as to this evidence.

Petitioner however submits that further evidence was easily accessible to counsel and necessary to petitioner's defense. Failure to present such testimony was therefore deficient representation.

In his petition before the District Court, petitioner sought to present the corroborating testimony of Mr. Latner's wife and further argued that Appellant's counsel could easily have obtained corroborating evidence from the coffee shop.

The failure to provide easily available corroborating evidence which would have a reasonable likelihood of affecting the outcome of a trial may constitute ineffective assistance of counsel. An attorney "must . . . provide factual support for [the] defense where such corroboration is available." U.S. v. Tucker, 716 F.2d 576, 594 (9th Cir. 1983). Failure to pursue such corroborating evidence with an adequate pretrial investigation establishes constitutionally deficient performance.

The District Court, in effect, dismissed the evidence from Roger Latner on grounds that there may have been occasional times in which petitioner was alone with Wendy, and thus the opportunity to commit the crimes existed.

The District Court has misinterpreted the significance of the fact that most of the mornings petitioner was away from the home as Wendy testified the incidents occurred in the morning before she went to school. Furthermore, she testified she was able to avoid molestation after 1990 by sneaking out the back door when going to school in the morning.

In fact, if petitioner effectively demonstrated that he was almost never at the house before Wendy was going out to school, such evidence would serve to undermine Wendy's detailed stories of incidents and her attempts to avoid them.

If the failure to present evidence is objectively unprofessional and prejudicial, it cannot be rationalized as a strategic choice unless it was actually the strategic choice of the trial attorney. For this reason, the district court erred in failing to conduct an evidentiary hearing to determine whether counsel had any strategic reasons for his failure to present corroborating evidence.

The Northern District Court further dismissed evidence that Wendy was willing to concoct stories of molestation with mere speculation. Petitioner asserted that Carleen Hunt would have testified that Wendy had previously lied about abuse as a means of retaliation against adults. Hunt's testimony, according to the District Court however, supported merely a "weak inference that Wendy was prone to lying. The jury, however, might also have seen it as an indication of how much Wendy had been

psychologically disturbed by petitioner's sexual abuse."

It is, no doubt, within the District Court's competence to make factual determinations as to whether Hunt would have been taken seriously by the jury or whether Hunt's testimony would have evoked images of Wendy's psychological disturbance. However there is no reasonable grounds for the determination as made by the District Court. From what Hunt has written, there is no evidence that Wendy was psychologically disturbed; there is only evidence that Wendy was willing to make grievous and untrue statements in order to get her way.

The District Court also dismissed evidence that Elizabeth had accused another man of molesting her in Los Banos. The Court concedes that the evidence might have shown that Elizabeth had a history of making false accusations against men, but the Court says, it might also have increased sympathy for Elizabeth. Mere speculation without the benefit of an evidentiary hearing on the matter, however, is insufficient to negate the reasonable likelihood that the outcome may have been different had counsel presented this evidence.

Furthermore, the Court's decision is based on a misinterpretation of petitioner's presented medical evidence. Dr. Wallace submitted a declaration stating that he had been petitioner's doctor for five years and that counsel had known such fact. Dr. Wallace would have testified that every four months during the five years, petitioner came in for a

checkup, and in those five years Dr. Wallace had never seen any signs of venereal warts.

The District Court however mistakenly reads Dr. Wallace's declaration (executed in 1995) as claiming that Dr. Wallace had been Appellant's doctor since late 1990, which would imply that Dr. Wallace could only testify that Appellant was wart-free between late 1990 and August of 1991. This reading of Dr. Wallace's declaration is patently absurd however as Appellant has been incarcerated by the California Department of Corrections since 1992. Dr. Wallace cannot have been Appellant's personal physician since that time. Therefore, Dr. Wallace had been Appellant's doctor since at least 1987.

Therefore, credible evidence existed to indicate petitioner had been free of venereal warts for five years. Although it is true that such warts may be difficult to see and may go dormant for a number of years, it is highly improbable that the jury would have believed petitioner had venereal warts undetected by a medical doctor for half a decade. It is much more likely that the jury would have taken Dr. Wallace's testimony as strong evidence that petitioner had never had sexual intercourse with Wendy.

II. DUE PROCESS WAS DENIED BY TRIAL COURT'S FAILURE TO STRIKE BIASED JURORS.

At trial, three jurors were challenged by defense counsel for cause. In each case, the trial court refused to strike the jurors. Petitioner submits, the trial court's denial deprived him of his constitutional right to an impartial jury.

A prospective juror must be removed for cause if his views would prevent or substantially impair the performance of his duties as a juror. Wainwright v. Witt, 469 U.S. 412, 424 (1985). "Even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial juror." Tinsley v. Borg, 895 F.2d 520, 523-34 (9th Cir. 1990). (internal quotations omitted). Courts analyze juror bias under two theories: actual bias and implied bias. The determination of whether a juror was actually biased is a pure question of fact (see Dyer v. Calderon, 122 F.3d 720, 728 (9th Cir. 1997) and is therefore entitled to a high measure of deference. Tinsley, supra, at 525.

However, a clearly erroneous ruling which conflicts with all the available evidence violates a defendant's right to a fair trial. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). In this case, the trial court made clearly erroneous findings in regards to three prospective jurors, which cannot, therefore, be entitled to any deference from this Court.

Prospective Juror Rouvaishyana was an educator who helped child victims of molestation, he had feelings of sympathy towards victims of molestation, his sister had accused his father of

incest, and his wife had been the victim of child molestation by her mother. When asked whether he could be fair, all he could respond was that he would do his best and that it wouldn't be impossible for him to make a fair decision.

The trial court, when defense counsel challenged Rouvaishyana for cause, denied the challenge, saying: "I would find his case, although he has been involved personally to some extent, as he indicated, his involvement cuts both ways. And I would accept his statement that he would do his best and he believes-and that I believe that he can be impartial."

The District Court reasoned that the District Court should not second-guess the trial court's decision that Rouvaishyana was not in fact biased against petitioner. It is however arguable that the trial court did not even make such a finding-that Rouvaishyana was in fact unbiased--but rather found only that Rouvaishyana could be unbiased. In any case, a finding that Rouvaishyana was unbiased is clearly erroneous. The trial court minimized the extent to which Rouvaishyana was involved in molestation matters, made the nonsensical claim that his experience "cuts both ways," and then asserted that he believes Rouvaishyana can be impartial, although the trial judge had the sense enough to correct himself when he almost attributed that belief to Rouvaishyana himself.

In fact, Rouvaishyana was deeply involved with all sorts of child molestation victims and, though it is clear that he wanted to be impartial,

could not bring himself to say that he would be impartial, only that it would not be impossible for him to be impartial. In fact, he stated his experience "would make it emotionally difficult" to sit on the jury and that he was a "little close to a case like this". Where the juror himself believes he may not be unbiased, the court abuses its discretion to so easily find him so.

Prospective juror Brines admitted that a year before the trial, the daughter of a friend of Brines' was molested. The incident bore striking similarity to Petitioner's case: it involved a family member and the victim was thirteen at the time. When Brines was asked whether she could set aside the situation when deciding the case, she responded, "I believe I could.... My problem is just seeing another child on the stand. I don't know how I would feel with their reaction." She stated she would try not to be misled by sympathy and that she would try to keep the situation with her friend's daughter separate from the facts of the trial, "but it would be hard to, just because of the same age group and seeing what she's been through." She also admitted that she would be more inclined to believe the victims against petitioner.

The trial judge denied the defense challenge as to juror Brines, stating, "I listened to her, observed her demeanor as she was responding to the questions. I think she responded honestly. I think her reservations are no more than other prospective jurors on the eve a trial of this nature." The District Court, in spite of the evidence, reasoned that the

bare fact that Brines stated that she would try not to let sympathy for the victims sway her judgment, was enough to grant the trial court deference in its decision.

Since the evidence demonstrates Brines was biased, including her own admission that she would be more inclined to believe the victims, the trial court's finding was entitled to no deference. The District Court and therefore the Ninth Circuit Court of Appeal clearly erred in granting it such.

Prospective juror Bennett had a close friend whose granddaughter had been molested. Bennett knew the daughter and knew that the stepfather had admitted molesting the child. Defense counsel challenged Bennett on other grounds (which challenge was denied), but petitioner argues that the trial court had a sua sponte duty to dismiss Bennett. The District Court reasoned that the trial court's decision to keep Bennett on the jury would have been proper because Bennett said she understood that in the granddaughter's case the stepfather had admitted to committing molestation, while petitioner had denied it. The Court also noted that Bennett said that she would try her best to keep this difference in mind although she didn't know for sure that she could.

This deference to the trial court's decision that Bennett was not biased is also clearly erroneous. All of the evidence indicates that Bennett was influenced by her situation, and that she felt that influence. The mere fact that she would be willing

to try to overcome that influence does not even begin to suggest a lack of bias.

Thus in all three cases, the trial court made clearly erroneous decisions, without any basis in fact or any evidence to support the conclusion that these prospective jurors were not biased. Because these decisions were clearly erroneous, this Court should give them no deference and reverse the District Court and the Court of Appeal's judgment.

Even if the trial judge had been entitled to great deference in his factual findings, the District Court should have found that there was bias which could be implied "from the potential for substantial emotional involvement, adversely affecting impartiality inherent in certain relationships." Tinsley v. Borg, 895 F.2d 520, 527 (9th Cir. 1990). Bias should be implied in extreme cases, such as "where a juror or his close relatives have been personally involved in a situation involving a similar fact pattern." Id., at p. 528.

In this case, juror Rouvaishyana had two family members personally involved in a similar situation. Jurors Brines and Bennett had close friends who had been involved in a molest situation. Bias in each of these jurors should have been inferred from the facts that they had family or close friends who had been molested and that they stated that this had had a substantial emotional impact adversely affecting impartiality.

The District Court only considered whether bias might be implied in the case of juror Rouvaishyana. The District Court notes that this

case appears to contain stronger evidence of "substantial emotional involvement than does Tinsley v. Borg, since Rouvaishyana had close relatives who had been molested. However, the District Court accepts the trial court's reasoning that Rouvaishyana's personal experience "cuts both ways." That is, the court determines "Although the molestation of his wife and sister might have made him more likely to convict, the accusation against his father, whom he as inclined to trust, might have made him more likely to acquit."

The District Court's justification for accepting this line of reasoning is the fact that a juror who has relatives who have been convicted of crimes might be sympathetic to the accused as well as to the victim. Dyer v. Calderon, 122 F.3d 720 (9th Cir. 1997). This justification, however, seriously misunderstands the facts in petitioner's case.

Juror Rouvaishyana's sister had accused their father of molesting her, while their father denied the accusation. Rouvaishyana had seriously conflicting feelings concerning that accusation: he believed both his sister and his father. Even if, as the court asserts, the accusation by Rouvaishyana's sister and his continued faith in his father served to cancel each other out, the fact that Rouvaishyana's wife had been molested by her mother and that he chose counseling children about sexual abuse and advocating children's rights as a living, unquestionably established that the juror had the "potential for substantial emotional involvement,

adversely affecting impartiality inherent in certain relationships."

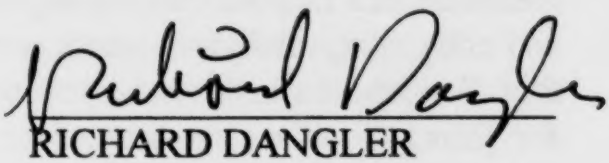
Unlike the juror in Tinsley, addressing the perspective of molestation victims was not just a small part of Rouvaishyana's practice, but his major focus. Unlike the juror in Tinsley, Rouvaishyana had not become trained in professional detachment. On the contrary, educating children concerning molestation implies teaching children about how to talk about real incidences of molestation; and advocating for women and children implies taking their side in a dispute concerning their veracity.

By Rouvaishyana own words, we can see that "I think it would make it emotionally difficult for [him] to sit on the jury..." and that "I have a feeling that, given that [molestation of his family members] and some of my professional background, I'm probably a little to close to a case like this, to be deciding it...." Thus, even though Rouvaishyana was willing to promise to do his best to be impartial, he did not think that he could actually be impartial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a Writ of Certiorari issue to review the judgment and unpublished opinion of the United States Court of Appeals for the Ninth Circuit in this matter.

Dated: January 13, 2000

By: 

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Counsel of Record

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED VARFES	)	No. 99-15146
	)	
Petitioner-Appellant,	)	D.C. No. CV-
v.	)	97-03707-FMS
ATTORNEY GENERAL OF THE	)	
STATE OF CALIFORNIA;	)	ORDER
ANTHONY NEWLAND,	)	
	)	
Respondents-Appellees.	)	
	)	

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, Presiding Judge

Argued and Submitted: October 8, 1999
San Francisco, California

Before: PREGERSON and WIGGINS, Circuit Judges, and CARTER, District Judge.[1]

We affirm on the basis of the well-written, well-reasoned decision of the District Court filed on June 29, 1998.

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[1] Honorable David 0. Carter, United States District Judge for the Central District of California, sitting by designation.

FILED
JUN 29 1998
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF
CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

FRED VARFES,	)	
	)	
Petitioner,	)	No. C 97-3707 FMS
	)	
vs.	)	ORDER DENYING
	)	PETITION FOR
ANTHONY NEWLAND,	)	HABEAS CORPUS
	)	
Respondent.	)	
	)	

ENTERED IN CIVIL DOCKET JUL - 1 1998

INTRODUCTION

This petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 requires the Court to determine (1) whether petitioner's trial counsel was ineffective for failing to present exculpatory evidence and request an alibi instruction; (2) whether petitioner was denied the right to an impartial jury by the trial court's denial of challenges for cause against three prospective jurors; and (3) whether the trial court erred in refusing to instruct the jury that they must

unanimously agree on which acts constituted continuous sexual abuse.

BACKGROUND

Petitioner, Fred Varfes, is a sixty-year old male serving a seventeen-year sentence in California state prison. He was convicted of sexually abusing and molesting two children in his household in 1990 and 1991. One was Wendy Moran, the daughter of his common law wife; the other was Elizabeth Varfes, his daughter by Shirley Varfes, his estranged wife.[1]

I. Continuous Sexual Abuse of Wendy

The state centered its case on Wendy's testimony. At trial, Wendy stated that petitioner had been living with her and her mother, Roberta Moran, since 1986. She recounted sixteen times that petitioner had committed sexual acts with her, between June 1990, when she was eleven, and July 1991, when she was twelve. The sexual acts included oral copulation and vaginal intercourse. They usually occurred in the evenings when petitioner and Wendy were alone in the house because Wendy's mother, Roberta Moran, had gone to a Moose Lodge meeting. Wendy testified that she had never had sex with or been sexually abused by anyone other than petitioner.

The government also presented medical evidence of sexual abuse. Dr. Mann, who had

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[1] The facts in this order are taken from the October 28, 1994 opinion of the California Court of Appeal.

examined Wendy, testified that she had genital warts, a sexually transmitted disease, that her vaginal opening was large for her age, and that her hymen was notched and smaller than normal. These findings were consistent with a history of old vaginal penetration.

Petitioner's trial counsel defended him in several ways. First, he attempted to rebut the prosecution's testimonial and medical evidence. Testifying in his own defense, petitioner denied Wendy's accusations. A doctor testified that he had examined petitioner and found no evidence of genital warts, but admitted that petitioner might still have warts because they can persist on men for years in an undetectable dormant state.

Petitioner's trial counsel also presented alibi evidence intended to show that petitioner was not alone with Wendy often enough to commit the acts she had described. Petitioner testified that he often met a friend, Robert Latner, in the mornings for coffee; his friend corroborated that testimony. Petitioner said that he often went to Moose Lodge meetings in the evenings with Roberta, Wendy's mother. Roberta corroborated that testimony, but admitted that sometimes she would go to the meetings alone, leaving petitioner alone at home with Wendy.

Another defense strategy was to suggest that Wendy may have been molested by her father or have had sex with a boyfriend. Both Roberta and Wendy testified that Wendy had spent three or four days in July 1990 with her father at the

motel where Roberta worked; because her father had admitted molesting another girl about Wendy's age, Wendy's grandmother stayed with them the entire time. According to Wendy's friend Carol Janes, Wendy once said that her father had told her that anytime she wanted a baby, she only needed to come to him; Wendy and her father both denied that he had made such a statement. The theory that Wendy had a boyfriend was based on the testimony of Dottie Cowles, a 75-year old friend of petitioner's. She testified that several times in 1988 or 1989, Wendy had come home from school with "an odor to her from sexual contact". Cowles had assumed that Wendy had been having sex at school; she never suspected that Wendy might be having sex with petitioner.

Finally, petitioner's trial counsel attempted to impeach Wendy's credibility. Petitioner suggested that she made up the allegations against him because he was strict with her. He also mentioned an incident in which Elizabeth and Wendy had lied, telling him that they were going to the park when really they were going out to call Shirley Varfes, Elizabeth's mother.

II. Molestation of Elizabeth

Petitioner molested Elizabeth, his daughter, three times in late June 1991. Elizabeth, who was twelve, was spending the summer with him and Roberta Moran. According to Elizabeth's testimony, the first incident occurred when she was sitting on a couch in the living room with petitioner's feet in her lap. He put his heel on her

crotch and moved it around; it made her uncomfortable and upset, so she moved his foot. She called her mother, Shirley Varfes, soon afterwards and told her what had happened. A few days later, petitioner asked Elizabeth to sit down next to him. He began to tickle her, and while doing so, he squeezed her left breast twice. Elizabeth became upset and told him not to do it. She again called her mother and told her about the incident. On a third occasion, Elizabeth was going out the door when petitioner grabbed her behind. Elizabeth's testimony was corroborated by her mother, who said that she received three phone calls from Elizabeth, and by Wendy, who said that she twice heard Elizabeth tell petitioner, "Stop, or I'll break your finger." In his defense, petitioner testified that although Elizabeth sometimes massaged his legs and he sometimes tickled her and swatted her on the behind to make her hurry up, he never touched her inappropriately and never noticed her get upset. Roberta Moran also testified that she never saw any inappropriate contact.

III. Evidentiary Hearing

After a jury trial, petitioner was convicted by the Mendocino County Superior Court on June 24, 1992 of one count of continuous sexual abuse of a minor with a special allegation that he abused a position of special trust and one count of misdemeanor child molestation. He was sentenced to seventeen years and $5,100 of restitution.

Petitioner filed an appeal and a consolidated writ of habeas corpus. The trial court

held an evidentiary hearing in 1992, after petitioner claimed that he had been convicted on the basis of false testimony. At the evidentiary hearing, Shirley Varfes testified that one morning during the trial, she and Elizabeth had been in the waiting area with a Victim/Witness Officer. Elizabeth, who was throwing a temper tantrum about having to return to court and testify a second time, had said that if forced to testify again, she would say that "it was all a lie." Maurice Roark, Sr., a friend of Shirley Varfes, corroborated Shirley Varfes' testimony, and added that in the car on the way to court that morning, Elizabeth had said that she did not want to lie any more. Roark also testified that after the trial, when Elizabeth was staying at his house, Roark eavesdropped on a telephone conversation between Wendy and Elizabeth; he heard them talk about a secret boyfriend of Wendy's and heard Wendy say something like "we set [petitioner] up real good." Shirley Varfes' cousin, Mary Ann Eckhardt, testified that several months before the trial she heard Wendy brag about a boyfriend and twice heard her say that she had made the accusations because she was angry at petitioner and wanted to get rid of him. Eckhardt testified that she did not tell anyone about these statements because she thought Wendy was just trying to get attention and because she thought that the trial had already happened.

Elizabeth and Wendy's testimony at the hearing contradicted that of Shirley Varfes, Roark, and Eckhardt. Elizabeth admitted that she had

threatened to say her testimony was a lie; however, she maintained that her trial testimony had been true and that she had made her threat to avoid having to testify again. Elizabeth denied that she and Wendy had talked about a secret boyfriend or about setting up petitioner. Wendy asserted that she had told the truth at trial, that she had no boyfriend, and that she had never told Eckhardt that she had fabricated her accusations. The trial court, finding that the testimony of Shirley Varfes, Roark, and Eckhardt was not believable, denied relief. The California Court of Appeal affirmed petitioner's conviction and denied his habeas petition on October 28, 1994. The California Supreme Court denied review and denied the petition on May 14, 1997. Petitioner then filed this habeas petition in federal court.

DISCUSSION

I. Standard of Review

The court may entertain a petition for a writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of the United States." 28 U.S.C. § 2254(a). To be granted relief, a petitioner must show that the state court adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . .or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Court must presume that the state

court's determination of factual issues is correct, a presumption that may only be rebutted by clear and convincing evidence. See 28 U.S.C. 2254(e)(1).

II. Analysis

A. Ineffective Assistance of Counsel

Petitioner alleges that his trial counsel failed to present exculpatory testimony, failed to present evidence that petitioner did not suffer from the venereal disease that was used to tie him to the victim, and failed to ask for an instruction on his alibi defense.

1. Legal Standard

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. See Strickland v. Washington, *466* U.S. 668, 686 (1984). The benchmark for judging a claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Ineffective assistance of counsel entitles a petitioner to habeas relief only if he can show both deficient performance and prejudice. See id. at 688.

A counsel's performance is deficient if it falls below an objective standard of reasonableness. See id. Judicial scrutiny of counsel's performance must be highly deferential, however, and a court must indulge a strong presumption that counsel's conduct falls within the

wide range of reasonable professional assistance. See id.; Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). It is unnecessary for a federal court considering a habeas ineffective assistance claim to address the prejudice prong of the Strickland test if the petitioner cannot even establish incompetence under the first prong. See Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998), petition for cert. filed, May 21, 1998 (No. 97-9175).

To prove prejudice, the petitioner must show that counsel's errors were so serious as to deprive him of a fair trial. See Strickland, 466 U.S. at 688. The petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See id. at 694. If the state's case is weak, the potential prejudicial effect of counsel's performance must be evaluated in light of that fact. See .Johnson v. Baldwin, 114 F.3d 8354, 838 (9th Cir. 1997). After all, if the state's case is weak there is a greater likelihood of a reasonable probability that the trial would have been different. See id. at 839-40 (finding counsel's failure to investigate and discredit defendant's unconvincing denial that he was at scene of crime prejudicial in light of government's weak case).

" ' [P]rejudice may result from the cumulative impact of multiple deficiencies. ' " Harris v. Wood, 64 F. 3d 1432, 1438 (9th Cir. 1995) (quoting Cooper v. Fitzharris, 586 F.2d 1325, 1333

(9th-Cir. 1978) (en banc)). In other words, in a case with various deficiencies, there may be a reasonable probability that, absent the various deficiencies, the outcome of the trial might well have been different. See id.

2. Failure to Present Exculpatory Testimony

Petitioner argues that his trial counsel failed to present testimony by witnesses to bolster his alibi and to show that the victims made inconsistent statements, had faked past injuries, and had brought prior unfounded molestation claims. The testimony, however, would have been repetitive and tangential, and so would not have substantially aided petitioner's defense.

Petitioner first argues that his trial counsel should have had Roger Latner testify to corroborate petitioner's alibi that the two men often met for coffee in the mornings. In fact, Roger Latner did so testify. (Pet. for Habeas Corpus, Ex. B-2 (Rep. Tr. on Appeal) at 288.) Petitioner also argues that counsel should have procured corroborating evidence from the coffee shop. Doing so would not have significantly helped his case. The weakness of petitioner's supposed alibi was not that it was unbelievable, but rather that it was incomplete. Petitioner himself testified that he was sometimes alone with Wendy, and Roger Latner testified that there were times that he and petitioner did not meet for coffee in the mornings. That occasional time alone with Wendy was all petitioner needed to commit the crime.

Petitioner's argument about inconsistent statements is also based on a misreading of the record. He asserts that Wendy testified that she had last seen her father, Richard Moran, six years before the trial; in fact, Wendy testified that she saw her father at a motel in 1990. (Rep. Tr. at 106.) This testimony was consistent with that of her father, who also said that they had seen each other at the motel in 1990. There was no inconsistent statement for trial counsel to point out. Because there was no question at trial that the 1990 meeting occurred, there is also no merit to petitioner's argument that trial counsel should have had Carol Janes, a friend of Wendy's who was present at the motel, confirm that the meeting took place.

Petitioner asserts that his trial counsel should have presented evidence that Wendy had faked injuries in the past. This argument is based on the declaration. of Carleen Hunt, petitioner's sister-in-law, that in November 1991 she saw Wendy hitting her own leg. When she asked Wendy why she was hurting herself, Wendy replied that it was so that she could tell Child Protective Services that Hunt was beating her. Wendy then said she was only joking. (Pet. for Habeas Corpus, Decl. of Carleen Hunt ¶¶ 4-5.) Hunt's testimony might have supported a weak inference that Wendy was prone to lying. The jury, however, might also have seen it as an indication of how much Wendy had been psychologically disturbed by petitioner's sexual abuse. The failure to present this evidence

therefore did not fall below an objective standard of reasonableness.

Finally, petitioner, faults his trial counsel for not bringing to light that the victims had made accusations of molestation against other men. Petitioner claims that his trial counsel should have subpoenaed records from Mendocino County Child Protective Services showing that Wendy had called them to make similar molestation allegations against Maurice Roark. According to the declaration of Shirley Varfes, however, those accusations were not made until after the trial concluded. (Pet. for Habeas Corpus, Decl. of Shirley Varfes ¶ 6.)

Shirley Varfes' declaration also states that in 1990, Elizabeth had accused another man of molesting her in Los Banos. According to the declaration, a case was brought against him but he eventually "got off." This evidence might have persuaded the jury that Elizabeth had a history of bringing false accusations; on the other hand, if the jury believed that Elizabeth had been molested before, it might have increased their sympathy for her. Moreover, defense counsel might not have been permitted to conduct a mini-trial on issues so tangential to those of the main case. See Fed. R. Evid. 608(b) (Specific instances of conduct by a witness may be inquired into on cross-examination to attack credibility only at discretion of trial court). For these reasons, petitioner has not shown that counsel's performance was deficient or prejudicial.

3. Failure to Present Exculpatory Medical Evidence

Petitioner claims that his trial counsel performed ineffectively by failing to present sufficient medical evidence. Because Wendy suffered from genital warts, the issue of whether or not petitioner suffered from them was a crucial piece of physical evidence linking him to her. According to the trial testimony of Dr. Mann, a government witness, genital warts are a viral disease transmitted through sexual contact. The diagnosis of genital warts on men is difficult because the warts can be small and because the virus can go into an undetectable remission for several years. At trial, petitioner's counsel called Dr. Graeber, who testified that petitioner did not currently show signs of genital warts, but that it was possible that he nevertheless carried the virus.

Petitioner argues that trial counsel should have supplemented this testimony by adducing additional evidence that petitioner did not have genital warts. First, he claims that trial counsel should have subpoenaed the results from a gynecological examination of Roberta Varfes, petitioner's wife, which showed that she did not suffer from genital warts, on the theory that if he had had warts, his wife would have had them as well. The results of the medical examination, however, would not have significantly added to Roberta's testimony that she had been tested for genital warts and had never had them. Second, petitioner claims that trial counsel should have called petitioner's family physician, Dr. Wallace, who would have testified that he had examined

petitioner every four months since late 1990, and that petitioner had never showed signs of genital warts. Dr. Graeber, however, mentioned in his testimony that he had a letter from Dr. Wallace, which stated that Dr. Wallace had examined petitioner on August 5, 1991 and had seen no warts. Although calling Dr. Wallace to the stand might have shown that petitioner was wart-free for an additional year, given the testimony that genital warts can remain dormant for many years, such testimony would not have substantially altered the probability of whether petitioner had the disease.

Petitioner also argues that trial counsel should have presented evidence suggesting Wendy might have been infected by a boyfriend or her father. The allegedly omitted evidence of a boyfriend was the telephone call between Wendy and Elizabeth that Maurice Roark overheard. That conversation, however, occurred in late July 1992, after the trial had concluded. The possibility that Richard Moran may have had genital warts was alluded to on direct examination, during which Richard Moran admitted that although he had never been treated for genital warts, he had "some bumps down there." On cross-examination, petitioner's trial counsel asked questions intended to show that Richard Moran spent a substantial amount of time alone with his daughter a few years before. The inference that Wendy may have been infected by her father rather than by petitioner was made reasonably clear by these questions. For these

reasons, counsel did not perform ineffectively in his treatment of the medical evidence.

4. Failure to Ask for Alibi Instruction

Petitioner argues that because he relied in part on an alibi defense, his trial counsel was ineffective for failing to request an alibi instruction for the continuous sexual abuse charge[2]. The trial counsel submitted a declaration in an earlier habeas proceeding that his failure to request this instruction was an oversight rather than a matter of trial strategy. (Pet. for Habeas Corpus, Ex. J.) Even assuming that the failure to request the instruction fell below an objective standard of reasonableness, however, the error was not prejudicial because there was no reasonable probability that the jury would have acquitted petitioner on that theory. Although petitioner presented evidence that he usually went to coffee with a friend in the mornings and to the Moose Lodge in the evenings, he admitted that he was sometimes alone with her at home in the afternoons and in the evenings. The crime of continuous sexual abuse requires only three instances of abuse over a period of at least three months. See Cal. Penal Code § 288.5(a). The evidence presented to the jury strongly indicated that he was alone with her at least that many times.

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[2] The issue of opportunity arose during trial only with respect the continuous sexual abuse of Wendy, not with respect to the single incident of molestation of Elizabeth.

For these reasons, the trial counsel's failure to request an alibi instruction did not constitute ineffective assistance.

B. Improper Jury-Selection

Petitioner argues that he was denied due process during jury selection because three jurors were allowed to serve who stated that their past experiences with sexual abuse and child molestation made them question their ability to be impartial.

1. Legal Standard

A prospective juror must be removed for cause if his views would prevent or substantially impair the performance of his duties as a juror. See Wainwright v. Witt, 469 U.S. 412, 424 (1985). "Even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury." Tinsley v. Borg, 895 F.2d 520, 523-34 (9th Cir. 1990) (internal quotations omitted).

Courts analyze juror bias under two theories: actual and implied bias. The determination whether a juror was actually biased is a pure question of fact. See Dyer v. Calderon, 122 F.3d 720, 728 (9th Cir. 1997). Because of the importance of such qualities as demeanor and inflection in determining credibility, the "findings of state trial and appellate courts on juror impartiality deserve 'a high measure of deference.' " Tinsley, 895 F.2d at 525 (quoting Rushen v. Spain, 464 U.S. 114, 120 (1982) (per curiam)).

Even if a juror's responses on voir dire do not indicate actual bias, bias can be implied from the "'potential for substantial emotional involvement, adversely affecting impartiality' inherent in certain relationships." Tinsley, 895 F.2d at 527 (quoting United States v. Alsup, 566 F.2d 68, 71 (9th Cir. 1977)). Bias should be presumed "[o]nly in 'extreme' or 'extraordinary' cases," id. (quoting Smith v. Phillips, 455 U.S. 209, 222-23 n.* (1982) (O'Connor, J., concurring)), such as "where a juror or his close relatives have been personally involved in a situation involving a similar fact pattern." Tinsley, 895 F.2d at 528. The Court considers de novo whether bias should be implied from the facts established by the trial court. See Smith v. Phillips, 455 U.S. 209, 222-23 n.* (1982) (O'Connor, J., concurring).

2. Prospective Juror Rouvaishyana

Prospective juror Rouvaishyana had both professional and familial experience that related to the issues in the case. Before taking the job he had at the time of voir dire, he had been a human service worker for ten years, primarily educating children about molestation. He had also worked as a volunteer advocate for women and children who had suffered rape or domestic violence. (Pet. for Habeas Corpus, Ex. C (Aug. Rep. Tr.) at 103.) During questioning outside the presence of the other jurors, he told the court that his sister had accused their father of "incesting" her; he said he was inclined to believe his sister, but also to trust their father, who denied molesting her. He

also said that his wife had been "incested" by her mother. (Aug. Rep. Tr. at 130.)

When asked whether he could be a fair juror, Rouvaishyana stated that he "would do [his] best" to fairly judge the case. "I firmly believe in any person accused is not guilty until proven guilty. But I think it would make it emotionally difficult for me to sit on the jury, if you would." (Aug. Rep. Tr. at 104.) Finally, after telling the court about the accusations of molestation in his family, he said that "I promise you and I would promise all of you that I would do my best. I have a feeling that, given that and some of my professional background, I'm probably a little close to a case like this, to be deciding it. . . . I would do my ultimate best to set everything else aside and just listen to what we're dealing with here." (Aug. Rep. Tr. at 130-31.)

Defense counsel, who had already used all his peremptory challenges, challenged Rouvaishyana for cause. The trial court denied the challenge, saying "I would find his case, although he has been involved personally to some extent, as he indicated, his involvement cuts both ways. And I would accept his statement that he would do his best and he believes--and that I believe that he can be impartial." (Aug. Rep. Tr. at 133.)

Petitioner's conviction cannot be overturned on an actual bias theory. The trial judge considered whether Rouvaishyana would be able to serve as an impartial juror, and concluded that he could. Given the great deference accorded to the trial judge's evaluation of Rouvaishyana's fitness,

and given Rouvaishyana's statements that he would "do [his] best" to fairly evaluate the evidence, the Court will not second-guess the trial court's decision that Rouvaishyana was not in fact biased against petitioner.

Nor does this case present the "extreme" and extraordinary" circumstances in which bias should have been presumed. The facts of this case are similar to those of Tinsley v. Borg, 895 U.S. 520 (9th Cir. 1990), a case in which the defendant was convicted of rape. The defendant argued that the trial court should not have empaneled one of the jurors, who had counseled a rape victim for a year and a half and had testified in court about the victim's credibility. The Ninth Circuit held that bias should not be implied because neither the juror nor any of her close relatives had been a rape victim, and because the juror did not know or have any information about the defendant or witnesses. Id. The court also emphasized that the rape victim was only "one client out of a 30-year career" and that the juror, as a psychiatric social worker, had been trained in professional detachment. Id. Like the juror in Tinsley, Rouvaishyana had advocated for victims of the crime at issue, although there is no indication in the record that he did so on a long-term basis or that he testified in court on their behalf. Rouvaishyana, who worked as an educator about these issues, can likewise be presumed to have developed some professional detachment. Moreover, Rouvaishyana

did not know petitioner or any of the witnesses in the case.

At first glance, this case appears to contain stronger evidence of "substantial emotional involvement" than was present in Tinsley in one regard: Unlike the juror in Tinsley, Rouvaishyana had close relatives who had suffered, or who claimed to have suffered, the particular crime at issue in the case -- molestation by a family member. As the trial court noted, however, Rouvaishyana's personal experience "cut[] both ways." Although the molestation of his wife and sister might have made him more likely to convict, the accusation against his father, whom he was inclined to trust, might have made him more likely to acquit. Cf. Dyer v. Calderon, 122 F.3d 720 (9th Cir. 1997) (noting that because juror had relatives who had been convicted of crimes, she might be sympathetic to the accused as well as to the victim). For these reasons, the Court holds that the trial court did not err in allowing Rouvaishyana to serve on the jury.

3. Prospective Juror Brines

Prospective juror Brines had a friend whose thirteen-year-old daughter had been molested by a family member. When asked whether she could set her experiences aside in deciding the case, Brines responded, "I believe I could. . . . My problem is just seeing another child on the stand. I don't know how I would feel with their reaction." She stated that she would try not to be misled by sympathy. On questioning by defense counsel, Brines again stated that she would try to keep the

situation with her friend's daughter separate from the facts of the trial, "But it would be hard to just because of the same age group and seeing what she's been through." She also admitted that her experience would make her more inclined to believe the victims. (Aug. Rep. Tr. at 124-26.)

Defense counsel challenged Brines for cause based on these statements about her friend's daughter. The trial court denied the challenge, stating, "I listened to her, observed her demeanor as she was responding to the questions. I think she responded honestly. I think her reservations are no more than other prospective jurors on the eve of a trial of this nature." (Aug. Rep. Tr. at 133.) Defense counsel then exercised a peremptory challenge against Brines.

Neither petitioner nor the government discusses whether petitioner can object to the trial court's denial of the challenge for cause even though he later removed the juror with a peremptory challenge; however, even assuming that the legal standard is the same as if the juror had served, petitioner has not shown that the trial court's denial of the challenge for cause was improper. It is true that Brines made some statements that indicated that she would be a less than ideal juror for petitioner. Nevertheless, Brines' assertion that she would do her best not to let sympathy for the victims sway her judgment in the case provided adequate support for the trial court's determination that she could fairly serve.

4. Prospective Juror Bennett

At voir dire, Bennett expressed reservations about the time commitment of serving on the jury, because she had a business project with a pressing deadline. She also said that she had "a close friend who's currently in a similar situation. Her granddaughter has been molested. I know the daughter and I know the [stepfather] that has admitted doing it." The trial judge pointed out that the situation in this case was different because the defendant had not admitted the molestation. Bennett stated that she "intellectually" understood the, difference, and that she would try "her best" to keep it in mind, although she didn't "know for sure" whether or not she could. Responding to defense counsel's questioning, Bennett stated that she did not believe that her friend's granddaughter had been molested, despite the stepfather's admission. (Aug. Rep. Tr. at 116-17.)

Defense counsel challenged Bennett for cause solely on the ground that she would not be able to give adequate attention to the case because of her business commitments. The trial court denied the challenge. Petitioner now argues that Bennett should have been excluded from the jury because she was biased against the defendant. Even had petitioner raised that objection at the time of trial, the trial court would have been within its discretion to deny the challenge. Bennett stated that she understood the differences between the situation with her friend's granddaughter and the facts of this case and that she would try her best to be fair. Her inclusion on the jury was proper.

C. Failure to Give Unanimity Instruction

Petitioner argues that he was denied due process because the trial court failed to instruct the jury that they must unanimously agree which of petitioner's acts constituted continuous sexual abuse. The Court disagrees. The Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. See In re Winship, 397 U.S. 358, 364 (1970). It does not, however, require that juries in state trials be unanimous. See Johnson v. Louisiana, 406 U.S. 356, 359 (1972). If state juries need not be unanimous on the ultimate question of guilt, it stands to reason that they not be unanimous on which particular acts constituted the illegal course of conduct. Cf. People v. Adames, 62 Cal. Rptr. 2d 631, 634-36 (Cal. Ct. App. 1997) (holding that absence of unanimity requirement in continuing sexual abuse statute does not violate federal due process).

The primary case relied upon by petitioner, United States v. Echeverri, 854 F.2d 638 (3rd. Cir. 1988), does not require a different result. In that case, the Third Circuit held that a federal jury must unanimously agree on which acts constitute a continuous criminal enterprise under the Racketeer Influenced and Corrupt Organization statute. Its conclusion was predicated on the requirement that federal juries be unanimous. See id. at 642-43. The reasoning of the case cannot be applied to trials in state courts, where unanimous juries are not

constitutionally required. The state court did not commit constitutional error when it refused to give the instruction.

CONCLUSION

For the foregoing reasons, the Court DENIES the petition for habeas corpus. Judgment shall be entered in accordance with this order. The Clerk of the Court shall close the file.

SO ORDERED.

Dated: June 29, 1998

"s/Fern M. Smith"
United State District Judge